Supreme Court, U.S.
FILED
931434 FEB 28 1994
OFFICE OF THE CLERK
No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE ADVOCATES FOR LIFE, INC.,
an Oregon nonprofit corporation, *et al.*,
Petitioners,

v.

LOVEJOY SPECIALTY HOSPITAL, INC.,
an Oregon corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF OREGON

PETITION FOR WRIT OF CERTIORARI

Alexis I. Crow
Counsel of Record
Anne-Marie Amiel
Brad Dacus
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, VA 22901
(804) 978-3888

William David Bailey
330 Crown Plaza
1500 S.W. First Avenue
Portland, Oregon 97201
(503) 222-1485

February 28, 1994

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

57pp

QUESTIONS PRESENTED

1. WHETHER THE FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH MAY BE RESTRICTED BY THE IMPOSITION OF PUNITIVE DAMAGES WHEN THERE ARE NARROWER MEANS TO PROTECT THE GOVERNMENT'S INTEREST IN UPHOLDING PUBLIC ORDER.

2. WHETHER, IN A CIVIL TRIAL ARISING OUT OF PUBLIC DEMONSTRATIONS ON A MATTER OF PUBLIC CONCERN, PUNITIVE DAMAGES MAY BE AWARDED WHEN THE JURY AWARDS ONLY NOMINAL UNDERLYING DAMAGES.

LIST OF PARTIES

The parties to the State Court proceedings were Petitioners, The Advocates for Life, Inc., an Oregon nonprofit corporation, Randy Craig Alcorn, Maria Bludworth, Andrew A. Burnett, Brian W. Clowes, Kathleen K. Clowes, Julius Gabriel DePaepe, Paul C. Deparrie, Robert Fulton Ekstrom, Gene Austin Fitzgerald, Cathy Gorsline, Judy L. Hager, Sean Robert Hahn, Marion Hite, Barbara Hurley, Kurt Robert Lantz, Robert William Morton, Norman R. Norquist, Catherine Ramey, Ron Rohman, John Robert Snyder, Steve Spinnett, Dawn M. Stover, Jeffrey W. Strong, Philip Tussing, James Marshall Tuttle, Stephen Vanhoff and Linda Waldrip, and Respondent Lovejoy Specialty Hospital, Inc., an Oregon corporation.

TABLE OF CONTENTS

	PAGES
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	v
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
1. THE FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH SHOULD NOT BE RESTRICTED BY THE IMPOSITION OF PUNITIVE DAMAGES WHEN THERE ARE NARROWER MEANS TO PROTECT THE GOVERNMENT'S INTEREST IN UPHOLDING PUBLIC ORDER	3
2. IN A CIVIL TRIAL ARISING OUT OF PUBLIC DEMONSTRATIONS ON A MATTER OF PUBLIC CONCERN, PUNITIVE DAMAGES SHOULD NOT BE AWARDED WHEN THE JURY AWARDS ONLY NOMINAL OR MINIMAL UNDERLYING DAMAGES	5
CONCLUSION	7
APPENDIX A	A-1
APPENDIX B	B-1
APPENDIX C	C-1

TABLE OF AUTHORITIES

CASES	PAGE
Central Hardware Co. v. NLRB, 407 U.S. 539, 92 S.Ct. 2238, 33 L.Ed.2d 122 (1972)	4
Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)	4
Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985)	4
First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) . .	4
Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964)	4
Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)	5
Lovejoy Specialty Hospital v. Advocates for Life, 121 Or App 160, 855 P2d 159 (1993); rev. denied 318 Or 98 (1993) (App. B)	1
NAACP v. Claiborne Hardware Co., 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) . . .	5
New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)	4
Roth v. United States, 354, U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)	4, 6
Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727, 11 L.Ed.2d 842 (1974)	3
Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed.2d 1093 (1940)	4
United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673 (1968)	5

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment I 2
U.S. Constitution, Amendment XIV 2
28 U.S.C. Sec. 1257 2

OTHER AUTHORITIES

4 J. Elliot, Debates on the Federal Constitution of 1787, p. 571 (1876) 7

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE ADVOCATES FOR LIFE, INC.,
an Oregon nonprofit corporation, et al.

Petitioners,

v.

LOVEJOY SPECIALTY HOSPITAL, INC.,
an Oregon corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Supreme Court of Oregon denied Petitioners' petition for review on November 30, 1993. The Oregon Supreme Court denied Petitioners' petition to reconsider its decision on February 8, 1994. These decisions of the Oregon Supreme Court are reproduced at Appendix A.

The Court of Appeals for the State of Oregon issued its opinion in *Lovejoy Specialty Hospital Inc., v. The Advocates for Life Inc.*, 855 P.2d 159 (1993), rev. denied, 318 Or. 98 (1993), on June 16, 1993. This decision is reproduced at Appendix B.

The Circuit Court for the State of Oregon for the County of Multnomah entered its unpublished judgment in *Lovejoy Surgicenter, Inc. v. The Advocates for Life Inc.*, (No. A8907-03773) on February 28, 1991. This decision reproduced at Appendix C.

JURISDICTION

Jurisdiction to review this judgment is conferred upon the Court by 28 U.S.C. Sec. 1257 in that the final decision of the highest court of Oregon abridges Petitioners' freedom of speech as guaranteed to them by the First and Fourteenth Amendments.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United Sates Constitution, Amendment XIV

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent, an abortion clinic, brought suit against these Petitioners in nuisance and trespass to enjoin and to recover damages for Petitioners' pro-life protest activities at Respondent's abortion clinic.

The trial court granted preliminary and permanent injunctions against Petitioners, awarding nominal or minimal underlying damages on all counts and punitive damages on each count ranging from $100,000 to $504,486.43.

Objections to instructions to the jury on the issue of punitive damages in cases involving constitutionally protected free speech were overruled.

The Oregon Court of Appeals affirmed the judgment of the trial court. Petition for review in the Supreme Court of the State of Oregon was denied on November 30, 1993 and petition for reconsideration was denied on February 8, 199 .

REASONS FOR GRANTING THE WRIT

1. THE FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH SHOULD NOT BE RESTRICTED BY THE IMPOSITION OF PUNITIVE DAMAGES WHEN THERE ARE NARROWER MEANS TO PROTECT THE GOVERNMENT'S INTEREST IN UPHOLDING PUBLIC ORDER.

Any tortious elements of Petitioners' expressive activities are subject to state regulation by statute or common law, and could be punished through criminal prosecutions for various felonies and misdemeanors, including riot, criminal trespass, criminal mischief, and disorderly conduct.

A private party, such as Respondent, also has an enforceable right to injunctive relief against trespass and nuisance, enforceable by puntive sanctions for contempt.

Punitive damages awarded in a civil suit are therefore not essential to the state's interest in upholding order and can only result in chilling the expression of unpopular views on a controversial issue.

Under the First Amendment, conduct is "speech" when "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1994).

The conduct of Petitioners at issue took place on the public sidewalk or, in the case of the front steps, in an area which "assume[d] to some significant degree the functional attributes of public property devoted to public use." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972).

The speech at issue in the present case was undeniably on a matter of public concern. This Court has frequently enunciated a desire to protect the right to hold unpopular views. In *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), this Court held:

> It is speech on "'matters of public concern'" at the heart of the First Amendment's protection." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776, 98 S.Ct. 1407, 1415, 55 L.Ed.2d 707 (1978), citing *Thornhill v. Alabama*, 310 U.S. 88, 101, 60 S.Ct. 736, 743, 84 L.Ed. 1093 (1994). As we stated in *Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 1689, 75 L.Ed.2d 708 (1983), this "special concern [for speech on public issues] is no mystery":
>
> > The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. *Roth v. United States*, 354 U.S. 476, 484 [77 S. Ct. 1304, 1308, 1 L.Ed. 2d 1498] (1957); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 [84 S.Ct. 710, 720, 11 L.Ed2d 686] (1964). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75, [85 S.Ct. 209, 215-216, 13 L.Ed.2d 125] (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the hierarchy of First Amendment values,'" and is entitled

> to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, [102 S.Ct 3409, 3425, 73 L.Ed.2d 1215] (1982).

Id. at 758-59 (footnote omitted).

In *United States v. O'Brien*, 391 U.S. 367 (1968), the defendant was convicted of burning his draft card in violation of federal law. In denying O'Brien's appeal, this Court enunciated a restriction on government regulation of expressive conduct which incidentally limits First Amendment freedoms.

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and *if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.*

391 U.S. at 376-77 (emphasis added).

2. IN A CIVIL TRIAL ARISING OUT OF PUBLIC DEMONSTRATION ON A MATTER OF PUBLIC CONCERN, PUNITIVE DAMAGES SHOULD NOT BE AWARDED WHEN THE JURY AWARDS ONLY NOMINAL OR MINIMAL UNDERLYING DAMAGES.

When the speech element at issue pertains to a matter of "public concern," this Court has expressly foreclosed punitive damages as a means to deter the unprotected, tortious element of that expression. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974). This limitation on damages strikes the proper balance between a state's legitimate interest in compensating private individuals for the harm done to them by any tortious nonspeech component of expressive activity, and the "unfettered interchange of ideas for the bringing about of political and

social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957).

In *Gertz*, the public concern was for a free press, albeit a defamatory press.

> The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, *the doctrine of presumed damages invites juries to punish unpopular opinion* rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, *the States have no substantial interest in securing for plaintiff such as this petitioner gratuitous awards of money damages far in excess of any actual injury.*

Id. at 349-50 (emphasis added).

The trial court in the present case erred in refusing to instruct the jury as to the constitutional protection of the right to speak, a protection afforded even where the exercise of that right may be met with hostility by many. As a result, the jury's assessment of punitive damages in this case leads inevitably to the perception that the verdict was fueled by a desire on the part of the jury to discourage opposition to abortion in the community. The very real possibility of facing financial ruin for the expression of controversial views cannot fail to have a chilling effect upon highly prized constitutional freedoms.

Some degree of abuse of a constitutionally protected right in a matter where emotions run high is perhaps to be expected, but this should not automatically lead to the total exclusion of First Amendment rights from consideration and an award of punitive damages. As James Madison pointed out: "Some degree of abuse is inseparable from the proper use of everything;

and in no instance is this more true than in that of the press." 4 J. Elliot, Debates on the Federal Constitution of 1787, P. 571 (1876). That inseparable degree of abuse is no less so when emanating from the mouths and bodies of protesters.

CONCLUSION

The imposition of punitive damages in the present case serves no compelling governmental interest that could not be served as well by a less restrictive regulation of First Amendment rights. Further, imposition of punitive damages in this case has the inevitable effect of chilling the very rights which are most highly cherished by Americans — the right to speak and the right to freely disagree with the majority.

For the reasons stated herein, we respectfully request that this Court reverse the decision of the lower courts with respect to the award of punitive damages against Petitioners.

Respectfully submitted,

Alexis I. Crow
Counsel of Record
Anne-Marie Amiel
Brad Dacus
THE RUTHERFORD
INSTITUTE
1445 East Rio Road
Charlottesville, VA 22901
(804) 978-3888

William David Bailey
330 Crown Plaza
1500 S.W. First Avenue
Portland, Oregon 97201
(503) 222-1485

February 28, 1994

IN THE SUPREME COURT OF THE STATE OF OREGON

LOVEJOY SPECIALITY HOSPITAL, INC., an Oregon Corporation,

Plaintiff-Respondent,
Respondent on Review,

v.

THE ADVOCATES FOR LIFE, INC. an Oregon nonprofit corporation; RANDY CRAIG ALCORN; MARIA BLUDWORTH; ANDREW A. BURNETT; BRIAN W. CLOWES; KATHLEEN K. CLOWES; JULIUS GABRIEL DEPAEPE; ROBERT FULTON EKSTROM; GENE AUSTIN FITZGERALD; CATHY GORSLINE; JUDY L. HAGER; SEAN ROBERT HAHN; MARION HITE; BARBARA HURLEY; KURT ROBERT LANTZ; ROBERT WILLIAM MORTON; NORMAN R. NORQUIST; CATHERINE RAMEY; RON ROHMAN; JOHN ROBERT SNYDER; STEVE SPINNETT; DAWN M. STOVER; JEFFREY W. STRONG; PHILIP TUSSING; JAMES MARSHALL TUTTLE; STEPHEN VANHOFF and LINDA WALDRIP,

Defendants-Appellants,

and

PAUL C. DEPARRIE,

Defendant-Appellant,
Petitioner on Review,

and

OPERATION RESCUE, INC., a New York non profit corporation; ROSEMARIE M. BELEZOS, RUSSELL DAVID DEVOSS; JUDITH ANNE QUIRING; HOWARD BAKER ROMANO; RACHELLE R. SHANNON; ROGER SHIPMAN; LINDA J. WOLFE; FRANKLIN L. HICKS; PRICILLA J. MARTIN; JAMES J. MILLER; KATHLEEN

M. STEWARD; JAMES D. DODSON; JAMES D. FELLOWS; ROBERT H. FOWLER; KIMBERLY ANN GORSLINE; KEVIN E. MCMORROW; LARRY JOSEPH PRANTL; MARGARET MARY RAINBOLDT and LISA J. MALONEY,

Defendants

Multnomah County Circuit
Court No. A8907-03773
CA A69120
SC S40365

ORDER DENYING REVIEW

The Court has considered the petition for review and ORDERS that it be denied.

Dated this 30th day of November, 1993.

WALLACE P. CARSON, JR.
CHIEF JUSTICE

Van Hoomissen and Unis, JJ., would allow

c: Arthur L. Tarlow — Attorney for Respondent on Review
William D. Bailey — Attorney for Appellants
Paul C. deParrie — *Pro se* Petitioner on Review

IN THE SUPREME COURT OF THE STATE OF OREGON

LOVEJOY SPECIALTY HOSPITAL, INC.
Respondent/Respondent

v.

ADVOCATES FOR LIFE INC
Appellant/Petitioner

RANDY CRAIG ALCORN
Appellant/Petitioner

MARIA BLUDWORTH
Appellant/Petitioner

ANDREW A. BURNETT
Appellant/Petitioner

BRIAN W. CLOWES
Appellant/Petitioner

KATHLEEN K. CLOWES
Appellant/Petitioner

JULIUS GABRIEL DEPAEPE
Appellant/Petitioner

PAUL C. DEPARRIE
Appellant/Petitioner

ROBERT FULTON EKSTROM
Appellant/Petitioner

GENE AUSTIN FITZGERALD
Appellant/Petitioner

CATHY GORSLINE
Appellant/Petitioner

JUDY L. HAGER
Appellant/Petitioner

SEAN ROBERT HAHN
Appellant/Petitioner

MARION HITE
Appellant/Petitioner

BARBARA HURLEY
Appellant/Petitioner

KURT ROBERT LANTZ
Appellant/Petitioner

ROBERT WILLIAM MORTON
Appellant/Petitioner

NORMAN R. NORQUIST
Appellant/Petitioner

CATHERINE RAMEY
Appellant/Petitioner

ROB ROHMAN
Appellant/Petitioner

JOHN ROBERT SNYDER
Appellant/Petitioner

STEVE SPINNETT
Appellant/Petitioner

DAWN M. STOVER
Appellant/Petitioner

JAMES W. STRONG
Appellant/Petitioner

PHILIP TUSSING
Appellant/Petitioner

JAMES MARSHALL TUTTLE
Appellant/Petitioner

STEPHEN VANHOFF
Appellant/Petitioner

WALDRIP LINDA
Defendant

RESCUE INC OPERATION
Defendant

ROSEMARIE M. BELEZOS
Defendant

RUSSELL DAVID DEVOSS
Defendant

JUDITH ANNE QUIRING
Defendant

HOWARD BAKER ROMANO
Defendant

RACHELLE R. SHANNON
Defendant

ROGER SHIPMAN
Defendant

LINDA J. WOLFE
Defendant

FRANKLIN L. HICKS
Defendant

PRICILLA J. MARTIN
Defendent

JAMES J. MILLER
Defendant

KATHLEEN M. STEWART
Defendant

JAMES D. DODSON

Defendant

JAMES D. FELLOWS

Defendant

ROBERT H. FOWLER

Defendant

KIMBERLY ANN GORSLINE

Defendant

MORROW KEVIN E MC

Defendant

LARRY JOSEPH PRANTL

Defendant

MARGARET MARY RAINBOLDT

Defendant

LISA J. MALONEY

Defendant

The court has considered the Petition for Reconsideration and orders that it be denied.

DATE: February 8, 1994

/S/WALLACE P. CARSON, JR.
CHIEF JUSTICE

DURHAM, J., NOT PARTICIPATING
VAN HOOMISSEN AND UNIS, JJ,
WOULD ALLOW

COPIES TO:

ARTHUR L. TARLOW	Attorney for Respondent/Respondent
WILLIAM D. BAILEY	Attorney for Appellant/Petitioner
PAUL C. DEPARRIE	Attorney for Defendant/Appellant

This computer-generated case caption may not comply with ORAP 2.05(1) & 5.05(5b)

IN THE COURT OF APPEALS OF THE STATE OF OREGON

FILED: June 16, 1993

LOVEJOY SPECIALTY HOSPITAL, INC.,
an Oregon Corporation,

Respondent,

v.

THE ADVOCATES FOR LIFE, INC., an Oregon nonprofit corporation; RANDY CRAIG ALCORN; MARIA BLUDWORTH; ANDREW A. BURNETT; BRIAN W CLOWES; KATHLEEN K. CLOWES; JULIUS GABRIEL DEPAEPE; PAUL C. DEPARRIE; ROBERT FULTON EKSTROM; GENE AUSTIN FITZGERALD; CATHY GOSLINE; JUDY L. HAGER; SEAN ROBERT HAHN; MARION HITE; BARBARA HURLEY; KURT ROBERT LANTZ; ROBERT WILLIAM MORTON; NORMAN R. NORQUIST; CATHERINE RAMEY; RON ROHMAN; JOHN ROBERT SNYDER; STEVE SPINNETT; DAWN M. STOVER; JEFFREY W. STRONG; PHILIP TUSSING; JAMES MARSHALL TUTTLE; STEPHEN VANHOFF and LINDA WALDRIP,

Appellants,

and

OPERATION RESCUE, INC., a New York nonprofit corporation; ROSEMARIE M. BELEZOS; RUSSELL DAVID DEVOSS; JUDITH ANNE QUIRING; HOWARD BAKER ROMANO; RACHELLE R. SHANNON; ROGER SHIPMAN; LINDA J. WOLFE; FRANKLIN L. HICKS; PRICILLA J. MARTIN; JAMES J. MILLER; KATHLEEN M. STEWART; JAMES D. DODSON; JAMES D. FELLOWS; ROBERT H. FOWLER; KIMBERLY ANN GORSLINE; KEVIN E. McMORROW; LARRY JOSEPH

PRANTL; MARGARET MARY RAINBOLDT and LISA J. MALONEY,

Defendants.

Appeal from Circuit Court, Multonomah County.

James R. Ellis, Judge.

Argued and submitted March 8, 1993.

William D. Bailey, Portland, argued the cause for appellants. With him on the briefs was Bailey & Wolfe, Portland.

Jeff Bennett, Portland, argued the case for respondent. On the brief were Arthur L. Tarlow and Bollinger, Hampton & Tarlow, Portland.

Before Deits, Presiding Judge, and Riggs and Durham, Judges.

RIGGS, J.

Award of attorney fees reversed and remanded; otherwise affirmed.

Durham, J. concurring.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellants Advocates for Life, Inc., Maria Bludworth, Andrew Burnett, Julius DePaepe, Robert Exstrom, Cathy Gorsline, Judy Hager, Sean Robert Hahn, Marion Hite, Norman Norquist, Catherine Ramey, Ron Rohman, John Robert Snyder, Steve Spinnett, Dawn Stover, Jeffrey W. Strong, Stephen VanHoff and Linda Waldrip as to respondent; respondent as to other appellants.

[ ] No costs allowed.

[XX] Costs allowed, payable to Advocates for Life, Inc., Maria Bludworth, Andrew Burnett, Julius DePaepe, Robert Ekstrom, Cathy Gorsline, Judy Hager, Sean Robert Hahn, Marion Hite, Norman Norquist, Catherine Ramey, Ron Rohman, John Robert Snyder, Steve Spinnett, Dawn Stover, Jeffrey W. Strong, Ste-

phen VanHoff and Linda Waldrip, by respondent; to respondent by other appellants.

In a case in which a party could be represented by appointed counsel entitled to compensation under ORS 138.500, but the prevailing party is represented by retained counsel or appeared *pro se*, the prevailing party is allowed costs.

MONEY JUDGMENT

Judgment #1	Judgment #2*
Creditor: _____	State of Oregon, Judicial Department
Debtor: _____	Unpaid filing fee:
Costs: _____	
Attorney fees: _____	
TOTAL AMOUNT: _____	$_____

Interest: Simple, 9% per annum, from the date of this appellate judgment.

*Judgment for unpaid filing fees. ORS 21.605(1)(c).

This section to be completed when the appellate judgment issues. See ORAP 14.05.(3).

NOTICE OF EXPENSES AND COMPENSATION UNDER ORS 138.500(4)

The appellate court has affirmed the conviction in this criminal case and has certified expenses and compensation of appointed counsel. This is notice to the trial court so that it may exercise its discretion under ORS 161.665(2) to include the expenses and compensation of appointed counsel in the final judgment, in addition to transcript preparation expenses allowed by the trial court. The court has certified expenses allowed by the trial court. The court has certified expenses allowed compensation in the amount of $_____.

This section to be completed when the appellate judgment issues. See ORAP 14.05(3).

Appellate Judgment Effective Date:

COURT OF APPEALS (seal)

RIGGS, J.

Defendants appeal a judgment that awarded plaintiff compensatory and punitive damages, and also attorney fees. Three of the defendants, who defaulted, appeal the denial of their motion to set aside a separate judgment under ORCP 71. We reverse and remand the award of attorney fees, and otherwise affirm.

Defendants are 27 individuals and a non-profit corporation who oppose abortion. Beginning in 1984, some defendants began picketing plaintiff, a clinic that provides medical services, including abortion. In 1986, defendants began blocking plaintiff's doors and trespassing on the parking lot and private property surrounding plaintiff's building. Property damage, lost business and incidents of pushing and other physical contact accompanied the protests.

Plaintiff brought an action for injunctive relief, trespass and nuisance, seeking punitive damages of $250,000 on each of the trespass and nuisance claims, compensatory damages of $6,160.43 for property damage and additional security expenses, and nominal damages for trespass and nuisance. The court entered a preliminary injunction enjoining defendants from entering plaintiff's property, demonstrating within a specified "keepclear" area or blocking plaintiff's doors. Eighteen defendants violated the injunction and were found in contempt. A trial on plaintiff's claims followed.

The court directed a verdict for plaintiff on the trespass and nuisance claims. That verdict is not challenged on appeal. The jury found that 21 of the defendants were each liable for a total of $1 in nominal damages and $200,000 in punitive damages on each of the nuisance and trespass claims. The remaining four defendants who appeared were each found liable for $4, 485.43 in nuisance damages, $1 in nominal damages for trespass and a total of $500,000 in punitive damages on the nuisance and trespass claims. A judgment for $504,486.43 was entered against three defendants who defaulted. Citing ORS 20.105, the trial court entered judgment for plaintiff's entire litigation expense against the 18 defendants who had violated the injunction.

Defendants who appeared make five assignments of error. They first assign error to the denial of their "motion for a directed verdict seeking the withdrawal of plaintiff's claims for punitive damages." Although defendants characterize that motion as a motion for a directed verdict, it was actually a motion to withdraw punitive damages from the jury's consideration, and we treat it as such. In a related assignment, they argue that the trial court erred when it gave a jury instruction on punitive damages. Defendants do not object to the wording of the instruction, but rather that a punitive damage instruction was given at all. In a third and also related assignment of error, defendants argue that the trial court erred by refusing their requested instruction that

punitive damages could only be awarded for conduct that is not intended to be expressive.

All three assignments are premised on the argument that Article I, section 8, of the Oregon Constitution and the First Amendment to the United States Constitution prohibit an award of punitive damages for tortious, but expressive, activity. Because they are related, we combine these three assignments for purposes of analysis. We review the trial court's rulings for errors of law.

Article I, section 8, of the Oregon Constitution prohibits assessment of punitive damages for torts resulting from an abuse of speech. *Lewis v. Oregon Beauty Supply Co.*, 302 or 616, 733 P2d 430 (1987). Defendants assume, without explanation, that nuisance and trespass are "expressive activities" entitled to the same protection as speech. Even if we agree that some of defendants' conduct was expressive, that conduct is not necessarily protected. Under *Huffman and Wright Logging v. Wade*, 109 Or App 37, 42, 817 P2d 1334 (1991), *rev allowed* 312 Or 676 (1992), a trespass claim can support punitive damages if the claim focuses on harm stemming from a physical trespass, and not on the content of the speech or expressive conduct that accompanied it. In this case, the court properly instructed the jury that

> "[t]he defendants have a constitutional right to oppose abortion and to try and convince others to oppose abortion and to persuade women not to have abortions.
>
> This also includes the right to picket and to demonstrate on public property in a peaceful, non-violent manner."

Plaintiff's claim for punitive damages was not based on the content of defendant's speech or expressive conduct, but was based on harm caused by physical acts. Under *Huffman*, those

physical acts do not merit Article I, section 8 protection simply because they are accompanied by speech or expressive conduct.

Defendants attempt to distinguish *Huffman* on the ground that the defendants in that case did not request a jury instruction limiting the jury's consideration of punitive damages to non-expressive conduct. The failure of the defendants in *Huffman* to request that instruction meant that we could not consider whether the jury considered the content of the defendant's speech when it assessed punitive damages. The defendants in *Huffman* also failed to segregate the expressive and non-expressive aspects of their speech, making review of the punitive damages for infringement of their Article I, section 8 rights difficult.

Defendants in this case did not properly request an instruction limiting the jury's consideration of punitive damages to the non-expressive aspects of their conduct. Defendants' requested instruction included a statement that "punitive damages may only be awarded against a defendant for conduct which is not intended to communicate." This is an incorrect statement of the law. As we held in *Huffman*, communicative conduct can support punitive damages if those damages are assessed against the non-protected tortious aspect of the conduct and not against its expressive aspect. 109 Or App at 42. As was the case in *Huffman*, defendants failed to segregate the expressive and the non-expressive aspects of their conduct.

On the basis of *Huffman*, we conclude that neither the denial of the motion to withdraw, nor the jury instruction on punitive damages not the refusal to give defendants' requested jury instruction violated Article 1, section 8.

Defendants next argue that the First Amendment prohibits the imposition of punitive damages for expressive conduct. Conduct has sufficient expressive elements to implicate the First Amendment if there is an intent to convey a particularized message and the likelihood is great that the message will be

understood by those who view it. *Texas v. Johnson*, 491 US 397, 404, 109 S Ct 2533, 105 L.Ed 2d 342 (1989). Although defendants do not isolate which of their activities were expressive, we assume for the sake of argument that some of their conduct was expressive under *Johnson*.

The government has a freer hand in restricting expressive conduct than it has in restricting speech. *Texas v. Johnson, supra*, 491 US at 406. Where expressive and non-expressive elements are combined in the same course of conduct, the conduct can be regulated if a sufficiently important governmental interest justifies an incidental limitation on First Amendments freedoms. The governmental interest must be unrelated to the suppression of free expression.

Here, state law permits imposition of punitive damages for conduct that combines expressive and non-expressive elements. In this case, punitive damages serve a fundamental, indeed primal, governmental interest in discouraging repeated trespasses and nuisances on private property that result in property damage, economic loss and violence.[1] Unlike the law in *Johnson*, which prohibited the burning of the American flag if that act was performed as political speech, the Oregon laws permitting punitive damages for trespass and nuisance prohibit certain acts regardless of their expressive features.[2] The government

---

[1] In *Bileu v. Paisley*, 18 Or 47, 52, 21 P 934 (1889), the Oregon Supreme Court described as a natural right, the right of people to enjoy their property free from molestation or interference. We note that the first legal writings in the Anglo-American tradition demonstrate a strong governmental interest in protecting the rights of property owners to be free from injurious trespass and nuisance. *See, e.g.*, The Laws of Alfred § 40 (10th century) (prohibiting trespass).

[2] Trespass is the unauthorized entry onto land in the exclusive legal possession of another. *Martin v. Union Pacific Railroad*, 256 Or 563, 474 P2d 739 (1970). Nuisance is the unreasonable infringement of a person's interest in the use and enjoyment of his or her land. *Jacobsen v. Crown Zellerback*, 273 Or 15, 18, 539 P2d 641 (1975). Punitive damages are

interest in protecting a landowner's interest is unrelated to speech. Consequently, the impact on protected speech is incidental. We conclude with expressive elements does not violate the First Amendment. The trial court's rulings on the motion to withdraw punitive damages and the rulings on jury instructions were not erroneous.

Defendants next assign error to submission of a verdict form that permitted the jury to award punitive damages of $250,000 per defendant on each of the two tort claims. Defendants also assign error to jury instructions that permitted a maximum punitive damage award of $250,000 per defendant. Defendants contend that the complaint prayed for no more than a total of $500,000 for all defendants. Therefore, they argue, the verdict form and the jury instructions awarded damages that exceeded those prayed for. We consider both assignments together.

Pleadings must specify the amount of money damages the party seeks. ORCP 18A(2). A verdict must not exceed the amount alleged and prayed for in the complaint. *Wiebe v. Seely, Administrator*, 215 Or 331, 357, 335 P2d 379 (1959). Disposition of these two assignments of error depends on the wording of the final complaint. Defendants state that the first sentence of the prayer in plaintiff's complaint reads:

> "WHEREFORE, plaintiff prays for judgment jointly and severally against all defendants as follows:"

This language arguably supports defendants' position. However, on the day of trial, the trial court permitted plaintiff to amend its complaint. One of the amendments struck the phrase "jointly and severally" from the first sentence of the prayer. After the amendments, the only prayer for joint and several damages against all defendants was one for $7,083.43 in actual

---

available when there is an intentional disregard of the landowner's rights. *Senn v. Bunick*, 40 Or App 33, 594 P2d 837, *rev den* 287 Or 149 (1979).

damages for nuisance. There was no error in the jury instructions or the verdict form.

Defendants who were held in contempt assign error to the award of attorney fees and costs. The trial court awarded plaintiff all its attorney fees and costs under ORS 20.105, which permits an award of attorney fees to the prevailing party against whom a defense is presented if the defending party willfully disobeyed a court order. A trial court's decision to award all, part or none of the attorney's fees authorized by statue is reviewed for abuse of discretion. Whether the fees were authorized by statute is reviewed as a question of law.

In its award of attorney fees, the trial court found that

> "it is unlikely that there would be any reasonable way to accurately separate those fees attributable, for example, solely to the contemnors and solely to matters related to the contempts, and in any case I exercise my discretion under ORS 20.105 not to require any such separation but to award all fees."

Defendants who were held in contempt argue that a court has no discretion to award fees unrelated to the contempt proceeding and that the fees attributable to the contempt proceeding could be segregated from the expenses for the nuisance and trespass litigation.

No cases directly address whether ORS 20.105 permits an award of a party's entire attorney fee whenever a court order has been disobeyed. However, this question has received uniform treatment under the more than 100 statues authorizing attorneys fees in particular cases. All of the analogous cases that we have reviewed require separation of authorized and non-authorized fees.[3] Absent statutory language to the contrary, we see no

---

[3] In *Greb v. Murray*, 102 Or App 573, 576, 795 P2d 1087 (1990), we held that fees must be apportioned between fees authorized by a contract

reason to depart from the general rule that authorized and unauthorized fees must be apportioned. The court did not expressly find that it was impossible to apportion fees. Indeed plaintiff's detailed billing statements suggest otherwise. The trial court erred in awarding plaintiff's total attorney fees and costs, and we remand for apportionment.

The final assignment of error concerns the judgment for $504,486.43 entered against each of three defendants who defaulted. Because they defaulted before service of the fourth (and final) amended complaint, those three defendants were name in a separate money judgment. After the jury assessed punitive damages of $200,000 against most defendants, the court said in a colloquy that it would award the same amount against the three defaulted defendants. However, it later awarded the full prayer of $500,000 in punitive damages against the three defaulted defendants.

Because three defaulted defendants mistakenly appealed the first judgment, which covered only defendants who appeared, they asked us to include them in the first judgment or to set aside the second judgment. That relief was denied. Two months after we denied relief, and 10 months after the second judgment had been entered, the defaulted defendants moved, in the trial court, to set aside the second judgment under ORCP 71. The grounds for relief urged were (1) clerical error and inadver-

---

provision and fees not so authorized. In reaching this conclusion, *Greb* relied on *Sunset Fuel and Engineering v. Compton*, 97 Or App 244, 775 P2d 901, *rev den* 308 Or 466 (1989) (attorney fees authorized by a lease) and *Estate of Wesley E. Smith v. Ware*, 307 Or 478, 769 P2d 773 (1989) (attorney fees for unlawful trade practices under ORS 646.638(3)). In a case where we held that it was error not to apportion fees between a civil rights claim for which fees were authorized and contract claims, for which fees were not authorized, we relied on the language of *Greb* as a statement of general applicability. *Nelson v. Emerald People's Utility District*, 116 Or App 366, 376, 840 P2d 1384 (1992), *rev allowed* ____ Or ____ (May 25, 1993).

tence on the part of the court, (2) surprise, mistake, inadvertence and excusable neglect on the part of the three defaulted defendants, and (3) misrepresentation on the part of the plaintiff. ORCP 71B(1).

The trial court rejected each ground for relief urged. Additionally, the court held that the motion was not made within a reasonable time. ORCP 71B. With regard to the untimeliness of the motion, the trial court said that

> "[the defaulting] defendants' failure to bring their motions within a reasonable time creates difficulties with regard to reconstructing the sequence of events and the state of mind of the court and the parties with regard to arguments now made by defendants."

We will not reverse a trial court's denial of a motion for relief from judgment absent a manifest abuse of discretion. *Blue Horse v. Sisters of Providence*, 113 Or App 82, 85, 830 P2d 611, *rev den* 314 Or 727 (1992). In *Blue Horse*, the trial court did not abuse its discretion when it denied a motion to set aside a judgment. The plaintiff in *Blue Horse* did not explain why a miscommunication with her attorney and a subsequent failure to appear at a hearing constituted excusable neglect. In this case, defendants never explain why they waited 10 months to have the judgment set aside. ORCP 71B permits a party to appeal simultaneously to this court and move set aside a judgment in the trial court. Defendants chose to appeal first and, when that appeal was denied, to wait another two months to move to have the judgment set aside. We cannot say that the trial court abused its discretion when denying defendants' motion because it was untimely.

Award of attorney fees reversed and remanded; otherwise affirmed.

Durham, J., concurring.

Although I join in the majority's result, I do not agree with the majority's categorical statement that expressive conduct can be punished through an award of punitive damages, consistent with Article I, section 8, if

> "the punitive damages are assessed against the non-protected tortious aspect of the conduct and not against its expressive aspect." ____ Or App at ____. (Slip opinion at 5.)

It is beyond dispute that those who trespass on another's property and cause damage cannot avoid responsibility for the injury by claiming that the tort was motivated by a desire to speak, or that communication occurred during the trespass. Whether or not trespassing falls within the rubric of an "abuse" of the freedom of speech, for which the entrant is responsible by the terms of Article I, section 8, the victim has a right under Article I, section 10 to initiate proceedings to recover compensation for harm done to the victim's interest in "property."[1]

However, an award of punitive damages in this context raises special problems. Such damages do not compensate for loss but punish the entrant and warn others not to engage in similar conduct. *Roshak v. Leathers*, 277 Or 207, 211, 560 P2d 275 (1977) says:

---

[1] Article I, section 8, of the Oregon Constitution provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

Article I, section 10, provides:

> "No court shall be secret, but justice shall be administered, openly and without purchase, completely and with delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

> "For many years it has been recognized in this state that '[t]he generally accepted doctrine [of punitive damages] is that such damages are awarded by way of punishment to the offender and as a warning to others, or, according to some authorities, by way of example.' *Martin v. Cambas*, 134 Or 257, 261, 293 P 601 (1930)."

I question the validity of a "law," in the form of a punitive damages judgment, that is intended to warn the community against repeating a tort that has occurred in the context of a political demonstration. Standing alone, a judgment for punitive damages does not inform the community whether the jury saw fit to punish all or only some of what may be an array of actions by demonstrators. The pleadings, jury instructions and evidence from a court trial may shed some light on the behavior that the jury sought to punish, but they rarely will guide the behavior of the organizers and participants in future demonstrations that vary in location, format and message. For example, the detail that the court's instructions in this case correctly distinguished defendants' unprotected tortious conduct from their protected expressive conduct will probably be lost on demonstrators who, years from now, may wish to express themselves, through conduct, to the full extent allowed by law on electoral politics, labor disputes, the environment or other controversies. To those citizens, the threat of a large punitive damage award could chill their enthusiasm not only for "unprotected tortious conduct," whatever that might be, but also for constitutionally protected speech.

Similar considerations led the Supreme Court in *Wheeler v. Green*, 286 Or 99, 119, 593 P2d 777 (1979), to hold:

> "We are convinced by these considerations that a proper application of Article I, § 8, prohibits the award of punitive damages in defamation cases, unless some other constitutional provision requires that they be

> allowed. As we have shown, Article I, § 10, the other provision with a direct application to defamation actions, does not."

The majority does not address the Supreme Court's concerns expressed in *Wheeler*. Instead, it relies on *Huffman and Wright Logging Co. v. Wade*, 109 Or App 37, 42, 817 P2d 1334 (1991), *rev allowed* 312 Or 676, in which this court upheld a punitive damage award against Earth First! demonstrators who trespassed on logging equipment. *Huffman and Wright Logging* distinguished *Wheeler* as a case "where the allegedly tortious conduct was the content of the speech or the expression of opinion," not the harm arising from a physical trespass. 109 Or App at 42.

I am not convinced that the distinction is meaningful. Whether the underlying tort is defamation or intentional trespass, the threat of a large punitive damage award carries a significant risk that potential defendants who engage in expressive activities will steer clear of lawful public criticism about the plaintiff. That risk is not ameliorated because, after the fact, the complaint for damages will focus on unpermitted trespassing or that a trial court will probably instruct a jury to award punitive damages only for conduct, including expressive conduct, that is not protected. The unacceptable consequence in each case is the same: self-censorship.

However, the *Huffman and Wright Logging* case is now the law. As the majority correctly notes, it cannot be distinguished from this case. The Supreme Court has granted review of that case, but to date, has not altered it. *Huffman and Wright Logging* supports the majority's result.

According, I concur.

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

No. A8907-03773

LOVEJOY SURGICENTER INC.,
an Oregon Corporation,

Plaintiff,

vs.

THE ADVOCATES FOR LIFE, INC., an Oregon nonprofit corporation; OPERATION RESCUE, INC., a New York nonprofit corporation; RANDY CRAIG ALCORN; ROSEMARIE M. BELEZOS; MARIA BLUDWORTH; ANDREW A. BURNETT; BRIAN W. CLOWES; KATHLEEN K. CLOWES; JULIUS GABRIEL DePAEPE; PAUL C. DePARRIE; RUSSELL DAVID DeVOSS; ROBERT FULTON EKSTROM; GENE AUSTIN FITZGERALD; CATHY GORSLINE; JUDY L. HAGER; SEAN ROBERT HAHN; MARION HITE; BARBARA HURLEY; KURT ROBERT LANTZ; ROBERT WILLIAM MORTON; NORMAN R, NORQUIST; JUDITH ANNE QUIRING; CATHERINE RAMEY; RON ROHMAN; HOWARD BAKER ROMANO; RACHELLE R. SHANNON; ROGER SHIPMAN; JOHN ROBERT SNYDER; STEVE SPINNETT; DAWN M. STOVER; JEFFREY W. STRONG; PHILIP TUSSING; JAMES MARSHALL TUTTLE; STEPHEN VanHOFF; LINDA WALDRIP; and LINDA J. WOLFE,

Defendants.

MONEY JUDGMENT

This case came on regularly for trial on January 14, 1991, before undersigned judge, and a jury. Plaintiff Lovejoy Sur-

gicenter, Inc. ("Surgicenter") appeared by and through Harlan Edward Jones of Bollinger, Hampton & Tarlow, its attorneys. Defendants Advocates for Life, Inc., Randy Craig Alcorn, Maria Bludworth, Andrew A. Burnett, Brian W. Clowes, Kathleen K. Clowes, Julius Gabriel Depaepe, Paul C. Deparrie, Robert Fulton Ekstrom, Gene Austin Fitzgerald, Cathy Gorsline, Judy L. Hager, Sean Robert Hahn, Marion Hite, Norman R. Norquist, Catherine Ramey, Ron Rohman, John Robert Snyder, Steve Spinnett, Dawn M. Stover, Jeffrey W. Strong, Philip Tussing, James Marshall Tuttle, Stephen Vanhoff and Linda Waldrip appeared by the through William Bailey, their attorney.

Plaintiff's claims for trespass and nuisance were tried to the jury; plaintiff's claim for a permanent injunction was tried to the court.

The attorneys made opening statements on behalf of their respective clients, introduced testimony and other evidence in support of their respective cases, and thereafter rested.

After all parties had rested, the court granted plaintiff's motion that the jury be instructed that plaintiff had prevailed as a matter of law on its claim of nominal damages in the amount of $1 against each defendant for trespass, and that plaintiff had prevailed as a matter of law on its claims of nuisance; but all issues of damages were left to the jury.

Arguments were made to the jury on behalf of the respective parties, and the jury, having been instructed upon all matters of law, and having retired to deliberate upon its verdict, did on February 11, 1991, return into court with a verdict in favor of the plaintiff, a true copy of which is attached hereto a Exhibit 1. The verdict was received.

The matter now having come on for judgment upon the foregoing verdict, it is hereby

ORDERED AND ADJUDGED as follows:

The Court expressly determines that there is no just reason for delay of entry of this judgment and expressly directs that judgment be entered notwithstanding that it may be a judgment as to less than all claims involving less than all parties.

MONEY JUDGMENT

ADVOCATES FOR LIFE, INC.

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Advocates For Life, Inc.

3. The amount of the judgment is $504,486.43.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $504,486.43.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

RANDY CRAIG ALCORN

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Randy Craig Alcorn.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

MARIA BLUDWORTH

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Maria Bludworth.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

ANDREW A. BURNETT

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Andrew A. Burnett.

3. The amount of the judgment is $504,486.43.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $504,486.43.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

BRIAN CLOWES

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Brian Clowes.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

KATHLEEN CLOWES

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Kathleen Clowes.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

JULIUS GABRIEL DePAEPE

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Julius Gabriel DePaepe.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

PAUL C. DePARRIE

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Paul C. DeParrie.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

ROBERT FULTON EKSTROM

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Robert Fulton Ekstrom.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

GENE AUSTIN FITZGERALD

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Gene Austin Fitzgerald.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

CATHY GORSLINE

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Cathy Gorsline.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

JUDY L. HAGER

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Joy L. Hager.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

SEAN ROBERT HAHN

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Sean Robert Hahn.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

MARION HITE

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Marion Hite.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

NORMAN R. NORQUIST

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Norman R. Norquist.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

CATHERINE RAMEY

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Catherine Ramey.

3. The amount of the judgment is $504,486.43.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $504,486.43.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

RON ROHMAN

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Ron Rohman

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

JOHN ROBERT SNYDER

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is John Robert Snyder.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

STEVE SPINNETT

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Steve Spinnett.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

DAWN M. STOVER

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Dawn M. Stover.

3. The amount of the judgment is $504,486.43.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $504,486.43.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9% simple interest dated from _____ on a balance due of $_____.

JEFFREY W. STRONG

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Jeffrey W. Strong.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9%, simple interest dated from _____ on a balance due of $_____.

PHILIP TUSSING

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Philip Tussing.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed post judgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements int he amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9%, simple interest dated from _____ on a balance due of $_____.

JAMES MARSHALL TUTTLE

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is James Marshall Tuttle.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court of clerk. These amounts shall bear postjudgment interest at the rate of 9%, simple interest dated from _____ on a balance due of $_____.

STEVEN VanHOFF

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Steven VanHoff.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owed postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear postjudgment interest at the rate of 9%, simple interest dated from _____ on a balance due of $_____.

LINDA WALDRIP

1. The judgment creditor is Lovejoy Surgicenter, Inc., which is represented by Harlan Edward Jones.

2. The judgment debtor is Linda Waldrip.

3. The amount of the judgment is $200,002.00.

4. There is no prejudgment interest.

5. The judgment creditor is owned postjudgment interest at the rate of 9% simple interest dated from February 22, 1991, on a balance due of $200,002.00.

6. Plaintiff is also awarded attorney fees in the amount of $_____ and costs and disbursements in the amount of $_____ to be determined subsequently under ORCP 68 and entered here by the court or clerk. These amounts shall bear post-judgment interest at the rate of 9%, simple interest dated from _____ on a balance due of $_____ .

SIGNED February 28, 1991.

_____
/s/JAMES R. ELLIS
CIRCUIT COURT JUDGE

SUBMITTED BY:
BOLLINGER/ HAMPTON & TARLOW
Attorneys for Plaintiff

_____
/s/By:HARLAN EDWARD JONES,
OSB #85054

VERDICT FORM

We, the jury find as follows:

1. Is any of the defendants liable to plaintiff for $1.00 in nominal damages on plaintiff's trespass claim?

Advocates for Life, Inc.	Yes Yes/No
Randy Craig Alcorn	Yes Yes/No
Maria Bludworth	Yes Yes/No
Andrew Burnett	Yes Yes/No
Brian W. Clowes	Yes Yes/No
Kathleen K. Clowes	Yes Yes/No
Julius Gabriel DePaepe	Yes Yes/No
Pual C. DeParrie	Yes Yes/No
Robert Fulton Ekstrom	Yes Yes/No
Gene Austin Fitzgerald	Yes Yes/No
Kathy Gorsline	Yes Yes/No
Judy L. Hager	Yes Yes/No
Sean Robert Hahn	Yes Yes/No
Marion Hite	Yes Yes/No

Norman R. Norquist	Yes Yes/No
Catherine Ramey	Yes Yes/No
Ron Rohman	Yes Yes/No
John Robert Snyder	Yes Yes/No
Steve Spinnett	Yes Yes/No
Dawn M. Stover	Yes Yes/No
Jeffery W. Strong	Yes Yes/No
Philip Tussing	Yes Yes/No
James Marshall Tuttle	Yes Yes/No
Stephen VanHoff	Yes Yes/No
Linda Waldrip	Yes Yes/No

2. If you find for plaintiff against any defendants on plaintiff's trespass claim, do you award punitive damages against those defendants? (If so, state the amount).

Advocates for Life, Inc.	$250,000
Randy Craig Alcorn	$100,000
Maria Bludworth	$100,000
Andrew Burnett	$250,000
Brian W. Clowes	$100,000
Kathleen K. Clowes	$100,000
Julius Gabriel DePaepe	$100,000
Pual C. DeParrie	$100,000
Robert Fulton Ekstrom	$100,000
Gene Austin Fitzgerald	$100,000
Kathy Gorsline	$100,000
Judy L. Hager	$100,000
Sean Robert Hahn	$100,000
Marion Hite	$100,000
Norman R. Norquist	$100,000
Catherine Ramey	$250,000
Ron Rohman	$100,000
John Robert Snyder	$100,000
Steve Spinnett	$100,000
Dawn M. Stover	$250,000
Jeffery W. Strong	$100,000
Philip Tussing	$100,000
James Marshall Tuttle	$100,000
Stephen VanHoff	$100,000
Linda Waldrip	$100,000

3. Do you find that any of the following defendants are jointly and severally liable to plaintiff on plaintiff's nuisance claim?

Advocates for Life, Inc.	Yes Yes/No
Randy Craig Alcorn	Yes Yes/No
Maria Bludworth	Yes Yes/No
Andrew Burnett	Yes Yes/No
Brian W. Clowes	Yes Yes/No
Kathleen K. Clowes	Yes Yes/No
Julius Gabriel DePaepe	Yes Yes/No
Pual C. DeParrie	Yes Yes/No
Robert Fulton Ekstrom	Yes Yes/No
Gene Austin Fitzgerald	Yes Yes/No
Kathy Gorsline	Yes Yes/No
Judy L. Hager	Yes Yes/No
Sean Robert Hahn	Yes Yes/No
Marion Hite	Yes Yes/No

Norman R. Norquist	Yes Yes/No
Catherine Ramey	Yes Yes/No
Ron Rohman	Yes Yes/No
John Robert Snyder	Yes Yes/No
Steve Spinnett	Yes Yes/No
Dawn M. Stover	Yes Yes/No
Jeffery W. Strong	Yes Yes/No
Philip Tussing	Yes Yes/No
James Marshall Tuttle	Yes Yes/No
Stephen VanHoff	Yes Yes/No
Linda Waldrip	Yes Yes/No

4. If you found any of the defendants jointly and severally liable to plaintiff on plaintiff's nuisance claim, what is the amount of damages you award plaintiff?

Advocates for Life, Inc.	$4,485.43
Randy Craig Alcorn	$1.00
Maria Bludworth	$1.00
Andrew Burnett	$4,485.43
Brian W. Clowes	$1.00
Kathleen K. Clowes	$1.00
Julius Gabriel DePaepe	$1.00
Pual C. DeParrie	$1.00
Robert Fulton Ekstrom	$1.00
Gene Austin Fitzgerald	$1.00
Kathy Gorsline	$1.00
Judy L. Hager	$1.00
Sean Robert Hahn	$1.00
Marion Hite	$1.00
Norman R. Norquist	$1.00
Catherine Ramey	$4,485.43
Ron Rohman	$1.00
John Robert Snyder	$1.00
Steve Spinnett	$1.00
Dawn M. Stover	$4,485.43
Jeffery W. Strong	$1.00
Philip Tussing	$1.00
James Marshall Tuttle	$1.00
Stephen VanHoff	$1.00
Linda Waldrip	$1.00

5. If you found any defendants liable as to plaintiff's nuisance claim, do you award punitive damages against those defendants? (If so, state the amount).

Advocates for Life, Inc.	$250,000
Randy Craig Alcorn	$100,000
Maria Bludworth	$100,000
Andrew Burnett	$250,000
Brian W. Clowes	$100,000
Kathleen K. Clowes	$100,000
Julius Gabriel DePaepe	$100,000
Puai C. DeParrie	$100,000
Robert Fulton Ekstrom	$100,000
Gene Austin Fitzgerald	$100,000
Kathy Gorsline	$100,000
Judy L. Hager	$100,000
Sean Robert Hahn	$100,000
Marion Hite	$100,000
Norman R. Norquist	$100,000
Catherine Ramey	$250,000
Ron Rohman	$100,000
John Robert Snyder	$100,000
Steve Spinnett	$100,000
Dawn M. Stover	$250,000
Jeffery W. Strong	$100,000
Philip Tussing	$100,000
James Marshall Tuttle	$100,000
Stephen VanHoff	$100,000
Linda Waldrip	$100,000